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## Limiting a Constitutional Tort Without Probably Cause: First Amendment Retaliatory Arrest After *Hartman*

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## NOTE

### **LIMITING A CONSTITUTIONAL TORT WITHOUT PROBABLE CAUSE: FIRST AMENDMENT RETALIATORY ARREST AFTER *HARTMAN***

Colin P. Watson\*

*Federal law provides a cause of action for individuals who are the target of adverse state action taken in retaliation for their exercise of First Amendment rights. Because these constitutional torts are “easy to allege and hard to disprove,” they raise difficult questions concerning the proper balance between allowing meaningful access to the courts and protecting government agents from frivolous and vexatious litigation. In its recent decision in *Hartman v. Moore*, the U.S. Supreme Court tipped the scales in favor of the state in one subset of First Amendment retaliation actions by holding that plaintiffs in actions for retaliatory prosecution must plead and prove a lack of probable cause for pressing the underlying charge as an element of their claim. This Note argues that a careful reading of *Hartman* demonstrates that, despite the recent holdings and dicta of several courts, *Hartman* neither requires nor supports a rule that the presence of probable cause for effectuating the underlying arrest precludes a claim for First Amendment retaliatory arrest (the “no-probable-cause rule”). This Note also seeks to demonstrate that pre-*Hartman* cases applying the no-probable-cause rule in actions for retaliatory arrest are bad law. After freeing courts from the constraints of *Hartman* and pre-*Hartman* circuit precedent, this Note argues that both legal arguments and policy considerations counsel against application of the no-probable-cause rule in actions for retaliatory arrest.*

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## INTRODUCTION

John Q. Activist is a well-known, if not notorious, government critic in the city of Hutchins. John earns income as a freelance food critic but spends much of his time writing, publishing, and distributing a weekly newsletter identifying and decrying the wasteful government spending of Hutchins's tax dollars. Of late, John has been particularly critical of the Hutchins Police Department's purchase of costly consulting services from Homeland Security Inc. John has claimed in print that the city did not bid the consulting contract competitively because of a romantic relationship between Police Chief Berkeley and Homeland's vice president of community relations. Both Hutchins and Chief Berkeley have denied the allegation.

Several weeks ago, while John was driving home from a long evening of editing at his downtown office, a Hutchins police officer pulled him over for failing to fully stop at a stop sign. John was clearly tired—his eyes were bloodshot and he was unable to give the exact hour or date. John explained to the officer that he had been up all night at his office attempting to meet a publishing deadline. The officer was finishing providing John with a warning regarding the dangers of driving while fatigued—preparing to let John leave without a ticket—when he noticed a stack of John's *Hutchins Accountability Weekly* newsletters piled on the passenger seat. The officer immediately recognized John as a local agitator and his demeanor shifted. The officer said John looked like he had been drinking and smelled a bit

odd—maybe like alcohol. The officer asked John to get out of the car and, as he placed him under arrest for suspicion of drunk driving in violation of Hutchins law, remarked that “I hope this doesn’t affect your ability to get that dishonest rag of yours to all your socialist friends in time for your next meeting.”

John, freed from jail after ten long hours and no charges, was intimidated. Believing himself the victim of an arrest made solely to punish him for his irreverent reporting and to deter him from criticizing Hutchins officials in the future, John filed suit in federal district court. He cited the arresting officer’s shift in demeanor and threatening reference to his work to support his contention that his arrest was unconstitutional retaliation for his exercise of his First Amendment right to publish carefully researched stories critical of his local government. During pretrial proceedings, the defendant officer claimed the arrest was fully constitutional because he had probable cause to believe that John had been drinking—the bleary eyes and incoherence, he asserts, are hallmarks of an intoxicated driver. The federal judge, crediting the officer’s finding of probable cause, declined to inquire into the officer’s actual reason for arresting John and dismissed the complaint. John is free, but reluctant to publish his weekly under what he perceives to be the threat of continued government harassment.

Courts agree that the First Amendment<sup>1</sup> protects individuals from retaliatory action motivated by the exercise of certain constitutional rights.<sup>2</sup> As the Tenth Circuit recently stated, “[a]lthough retaliation is not expressly discussed in the First Amendment, it may be actionable inasmuch as governmental retaliation tends to chill citizens’ exercise of their constitutional rights.”<sup>3</sup>

Victims of state or federal retaliatory action may seek redress under section 1983 of the Civil Rights Act<sup>4</sup> or *Bivens v. Six Unknown Named Agents*

1. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

2. See, e.g., *Norwell v. City of Cincinnati*, 414 U.S. 14 (1973); *Evans v. Fogarty*, 241 F. App’x 542 (10th Cir. 2007); *Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990) (“[A]ny action to punish or deter [First-Amendment-protected] speech—such as stopping or hassling the speaker—is categorically prohibited by the Constitution.”); MICHAEL AVERY ET AL., *POLICE MISCONDUCT: LAW AND LITIGATION* § 2:28, at 134 (3d ed. 2007) (“Law enforcement activities designed to retaliate against persons for criticizing government officials, or filing lawsuits against them, violate the First Amendment.”).

3. *Evans*, 241 F. App’x at 550 (quoting *Perez v. Ellington* 421 F.3d 1128, 1131 (10th Cir. 2005)).

4. 42 U.S.C. § 1983 (2000). Section 1983 of the Civil Rights Act grants citizens a civil cause of action for damages against constitutional violations committed by individuals acting in their capacity as agents of a state. Christopher J. Pettit, *The Evolution of Government Liability Under Section 1983*, 24 ST. MARY’S L.J. 145, 146–47 (1992). To the consternation of many jurists and academics (and no doubt targeted state actors), section 1983 has increasingly become a source of litigation. E.g., Susanah M. Mead, *Evolution of the “Species of Tort Liability” Created by 42 U.S.C. § 1983: Can Constitutional Tort Be Saved From Extinction?*, 55 FORDHAM L. REV. 1, 10–13 (1986).

of Federal Bureau of Narcotics.<sup>5</sup> Plaintiffs seeking to recover for allegedly unconstitutional retaliation must plead and prove (1) the existence of a right protected by the First Amendment; (2) that the exercise of that right was a substantial motivating factor in the decision to take the adverse action; and (3) that the adverse action chilled the exercise of the protected right.<sup>6</sup> Further, to prove the prima facie case, a plaintiff must demonstrate that his exercise of a First-Amendment-protected right was the “but-for” cause of the adverse action.<sup>7</sup> Conduct merely shaded by constitutionally impermissible motive does not rise to the level of a constitutional violation.<sup>8</sup> Consequently, a defendant may avoid liability if he can persuade the fact finder that he would have taken the challenged action notwithstanding any personal animus engendered by First Amendment conduct.<sup>9</sup>

A minority of jurists do reject the idea that section 1983 of the Civil Rights Act provides a tort cause of action for intent-based constitutional torts, but this rejection is limited. Critics of the majority view maintain that section 1983, as enacted, was meant only to provide a cause of action for damages against state agents acting pursuant to a duly enacted, but unconstitutional, state statute.<sup>10</sup> Notwithstanding their disagreement about the precise nature of the Civil Rights Act enacted by Congress, these jurists do not actively seek to abrogate current section 1983 jurisprudence, but instead support making intent-based constitutional torts more difficult to plead and prove.<sup>11</sup>

Courts agree less on the proper adjudicatory framework for resolving the subset of retaliation claims concerned with allegedly unconstitutional arrest.<sup>12</sup> Until recently, federal courts of appeals disagreed as to whether the

5. 403 U.S. 388 (1971). *Bivens* provides individuals the same damages remedy against federal government agents that is available against agents of the individual states under section 1983. See, e.g., *Hartman v. Moore*, 547 U.S. 250, 254 n.2 (2006) (“[A] *Bivens* action is the federal analog to suits brought against state officials under . . . 42 U.S.C. § 1983.”).

6. E.g., *Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 821 (6th Cir. 2007) (outlining the test applied across circuits in First Amendment retaliation claims).

7. E.g., *Hartman*, 547 U.S. at 256 (“[W]e have held that retaliation is subject to recovery as the but-for cause of official action offending the Constitution.”); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285–86 (1977); *Ctr. for Bio-Ethical Reform*, 477 F.3d at 823.

8. See *Hartman*, 547 U.S. at 256.

9. *Ctr. for Bio-Ethical Reform*, 477 F.3d at 823.

10. See, e.g., *Monroe v. Pape*, 365 U.S. 167, 202–59 (1961) (Frankfurter, J., dissenting) (arguing against reading the Civil Rights Act to provide a cause of action against government agents not acting pursuant to a duly enacted statute).

11. E.g., *Crawford-El v. Britton*, 523 U.S. 574, 611–12 (1998) (Scalia, J., dissenting) (expressing displeasure with the current state of section 1983 jurisprudence but advocating the adoption of a qualified immunity rule that would only make prosecuting such actions more difficult).

12. Arrest is just one form of state action that can give rise to an action for First Amendment retaliation. The impermissible retaliation can take many forms. See *Hartman*, 547 U.S. 250 (criminal prosecution); *Crawford-El*, 523 U.S. 574 (intentional misdirection of prisoner’s personal effects); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (termination of employment); *Mt. Healthy*, 429 U.S. 274 (same); *Williams v. City of Carl Junction*, 480 F.3d 871 (8th Cir. 2007) (municipal citation); *Skoog v. County of Clackamas*, 469 F.3d 1221 (9th Cir. 2006) (search and seizure); *Bloch v. Ribar*, 156 F.3d 673 (6th Cir. 1998) (disclosure of sensitive personal information regarding plain-

presence of probable cause for effectuating the arrest that is the subject of a First Amendment retaliation action ought to preclude a plaintiff's recovery.<sup>13</sup> The Second and Eleventh Circuits held that as a matter of law a police officer is not liable for unconstitutional retaliation in an action by an arrestee where probable cause supported the underlying arrest.<sup>14</sup> These two circuits adhere to a "no-probable-cause rule" that places an additional burden on plaintiffs.<sup>15</sup> Reaching the opposite conclusion, the Sixth Circuit held that the existence of probable cause does not preclude a plaintiff's constitutional claim.<sup>16</sup> While the existence of probable cause has probative value in an action for retaliatory arrest, the Sixth Circuit reasoned, it by no means determines the action.<sup>17</sup>

A recent decision by the U.S. Supreme Court drastically altered the First Amendment retaliation landscape and complicated the role that probable cause plays in the analysis of claims for retaliatory arrest. In its 2006 decision in *Hartman*, the Court resolved a different circuit disagreement and made the absence of probable cause for pressing the underlying charge an element of a claim for First Amendment retaliatory prosecution.<sup>18</sup> In the eighteen months since the Court decided *Hartman*, courts addressing all manner of First Amendment retaliation actions have relied on *Hartman* in imposing the no-probable-cause rule in various, non-prosecution settings.<sup>19</sup> After *Hartman* the

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tiff's rape); *Musso v. Hourigan*, 836 F.2d 736 (2d Cir. 1988) (denial of opportunity to speak at public meeting).

13. *Baldauf v. Davidson (Baldauf I)*, No. 1:04-cv-1571-JDT-TAB, 2007 WL 1202911, at \*5-6 (S.D. Ind. Apr. 23, 2007) (discussing the existence and nature of the disagreement), *modified*, 2007 WL 2156065 (S.D. Ind. July 24, 2007).

14. See, e.g., *Dahl v. Holley*, 312 F.3d 1228 (11th Cir. 2002); *Curley v. Vill. of Suffern*, 268 F.3d 65 (2d Cir. 2001); *Redd v. City of Enterprise*, 140 F.3d 1378 (11th Cir. 1998); *Singer v. Fulton County Sheriff*, 63 F.3d 110 (2d Cir. 1995); *Mozzochi v. Borden*, 959 F.2d 1174 (2d Cir. 1992); *Ybarra v. City of Miami*, No. 02-20972-CIV, 2003 WL 25564426 (S.D. Fla. Aug. 12, 2003).

15. The Supreme Court has adopted this terminology in addressing the issue in the context of actions alleging retaliatory prosecution. *Hartman*, 547 U.S. at 258–59.

16. *Greene v. Barber*, 310 F.3d 889 (6th Cir. 2002). The Ninth Circuit, while adjudicating a retaliation claim, asserted that the Tenth Circuit is in agreement with the Sixth Circuit. *Skoog*, 469 F.3d at 1232 n.31 (citing *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990)). However, a review of the case law reveals that the Tenth Circuit's position is less than clear. See *DeLoach*, 922 F.2d at 620 n.2 ("The firmness of [defendant's] conviction about [plaintiff's] guilt [with regard to the underlying crime] is not relevant to, and does not justify . . . retaliatory action against [plaintiff]."), *cert. denied*, 502 U.S. 814 (1991). Crucially, this Tenth Circuit case does not clearly address the role that objective probable cause for effectuating the arrest ought to play in the legal calculus.

17. *Greene*, 310 F.3d at 895, 896–97.

18. *Hartman*, 547 U.S. at 265–66. Retaliatory-prosecution actions are simply actions brought to challenge the constitutionality of a prosecutor's decision to file and pursue criminal or civil charges. Prior to *Hartman*, actions for retaliatory prosecution were litigated in the same manner as any other First Amendment retaliation action. See *supra* text accompanying notes 6–9.

19. *Williams v. City of Carl Junction*, 480 F.3d 871, 876 (8th Cir. 2007) ("We agree . . . that the Supreme Court's holding in *Hartman* is broad enough to apply even where intervening actions by a prosecutor are not present, and we conclude that the *Hartman* rule applies in this [action alleging retaliatory citation]."); *Barnes v. Wright*, 449 F.3d 709, 720 (6th Cir. 2006) ("[I]n its analysis, *Hartman* appears to acknowledge that its rule sweeps broadly . . ."); *Baldauf v. Davidson (Baldauf II)*, No. 1:04-cv-1571-JDT-TAB, 2007 WL 2156065 (S.D. Ind. July 24, 2007) (reading *Hartman* to

Sixth Circuit determined that its earlier cases rejecting a no-probable-cause rule in the retaliatory-arrest action were no longer good law.<sup>20</sup>

Though a clearly defined circuit disagreement no longer exists,<sup>21</sup> the debate continues. Some federal courts of appeals have yet to rule on whether probable cause precludes an action for retaliatory arrest, and so the debate continues. Several state and federal district courts in jurisdictions whose highest court has not yet ruled on the no-probable-cause rule's application to actions for retaliatory arrest have declined to read *Hartman* to apply to situations alleging anything other than retaliatory prosecution, including actions for retaliatory arrest.<sup>22</sup>

This Note considers whether the Supreme Court's recent decision in *Hartman* supports a rule that the presence of probable cause for effectuating an arrest should preclude a First Amendment retaliatory-arrest action and concludes that it does not. It argues that courts, unconstrained by *Hartman*, should decline to adopt the no-probable-cause rule in the arrest context. Part I analyzes the opinion in *Hartman* and argues that it does not support a no-probable-cause rule in the arrest context because its holding is limited to actions alleging retaliatory prosecution. Part II advocates rejecting the no-probable-cause rule in the arrest context and argues that the existence of probable cause does not determine the key issue in an action for retaliatory arrest: causation. Part II then challenges the thin legal reasoning supporting the no-probable-cause rule pre-*Hartman*. It asserts that the Second and Eleventh Circuits, the rule's early adopters, implemented the rule through the application of impertinent case law or adherence to questionable precedent and failed to articulate an argument for deviating from the straightforward application of the claim's elements. Part III asserts that proponents of the no-probable-cause rule have yet to offer a persuasive policy argument in favor of imposing the rule in retaliatory-arrest actions.

## I. *HARTMAN*: INAPPLICABLE IN THE ARREST CONTEXT

Part I argues that the Supreme Court's recent decision in *Hartman*—requiring plaintiffs in First Amendment retaliatory-prosecution actions to plead and prove the absence of probable cause for pressing the underlying charge—does not dictate imposition of the no-probable-cause rule in non-prosecution contexts. Section I.A describes the *Hartman* litigation, parses

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require plaintiff in a retaliatory-arrest action to plead and prove the lack of probable cause); *Hansen v. Williamson*, 440 F. Supp. 2d 663, 676 (E.D. Mich. 2006).

20. See *Hansen*, 440 F. Supp. 2d at 676 (purporting to recognize the abrogation of the primary Sixth Circuit case refusing to find the presence of probable cause determinative).

21. The elimination of the circuit disagreement is complete to the extent that the Tenth Circuit did not clearly hold that the presence of probable cause is not dispositive in an action for retaliatory arrest. See *supra* note 16.

22. *Skoog v. County of Clackamas*, 469 F.3d 1221, 1234 (9th Cir. 2006) (reading *Hartman* narrowly and refusing to apply its holding in an action for retaliatory search and seizure); *Gullick v. Ott*, 517 F. Supp. 2d 1063, 1070–72 (W.D. Wis. 2007) (analyzing and refusing to apply *Hartman* in an action for retaliatory arrest); *Grassilli v. Barr*, 48 Cal. Rptr. 3d 715, 731–33 (Cal. Ct. App. 2006) (same).

the opinion, and identifies the two necessary considerations on which the Court's holding depends. Section I.B concludes that because *Hartman's* holding is dependent on the presence of an unusual causal gap—arising where the presence of an intervening actor complicates the link between the defendant's animus and the allegedly retaliatory action—and because retaliatory-arrest actions are not characterized by this gap, *Hartman's* holding does not constrain lower courts in adjudicating actions for retaliatory arrest.

*A. Hartman Depends on the Presence of Objective Probable Cause Evidence and the "Causal Gap"*

Parsing *Hartman* is necessary to understanding the contours of its holding and its possible application in the retaliatory-arrest context. If the principles underlying *Hartman* apply in the arrest setting, then the newly formed circuit consensus is valid. If, however, *Hartman's* holding does not translate, courts should look anew at the issue of whether the presence of probable cause should preclude an action for retaliatory arrest. Section I.A.1 sets out the circumstance that gave rise to litigation in *Hartman*, providing readers with concrete facts that will enable a clearer understanding of retaliation actions generally and the *Hartman* litigation and opinion specifically. Section I.A.2 argues that *Hartman* depends on the fact that retaliatory-prosecution actions reliably present objective and probative probable cause evidence that speaks to the issue of causation. Section I.A.3 argues that *Hartman's* holding further depends on the existence of a causal gap that renders proving the link between constitutionally protected conduct and adverse state action more difficult in the retaliatory-prosecution action than in the normal retaliation action, and makes evidence of the absence of probable cause practically necessary to prove an impermissible motive.

1. *The Facts*

Plaintiff William G. Moore, Jr. was the chief executive officer of REI, a manufacturer of multiline optical character readers for use in interpreting multiple lines of printed text.<sup>23</sup> Moore successfully lobbied against a U.S. Postal Service plan to adopt a single-line text system that would have harmed his business, but then ultimately failed to procure a government contract for which his firm was competing.<sup>24</sup> After losing the contract, Moore made several public statements critical of the Postal Service.<sup>25</sup> A short time later, federal agents investigated and then charged Moore and several others in connection with alleged kickbacks and improper conduct in the selection of a new postmaster general.<sup>26</sup> The U.S. District Court for the District of

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23. *Hartman*, 547 U.S. at 252.

24. *Id.* at 252–53.

25. *Id.* at 253.

26. *Id.*



Columbia eventually dismissed the government's charges after finding a "complete lack of direct evidence."<sup>27</sup>

Moore then initiated suit against five postal inspectors alleging that he was prosecuted in retaliation for his comments critical of the U.S. Postal Service, comments protected by the First Amendment.<sup>28</sup> The U.S. District Court for the District of Columbia denied the defendant inspectors' motion for summary judgment and the Court of Appeals for the District of Columbia affirmed.<sup>29</sup> The inspectors subsequently moved for summary judgment based on qualified immunity, arguing that probable cause supported the prosecution, but the district court denied the motion and the D.C. Circuit affirmed.<sup>30</sup> The Supreme Court granted certiorari in order to resolve a circuit disagreement as to whether probable cause for pressing the underlying charge should, as a matter of law, defeat the claim for retaliatory prosecution.<sup>31</sup> The sole issue on appeal was whether the existence of probable cause precludes a claim for retaliatory prosecution.<sup>32</sup>

## 2. *The Result Depends on the Availability of Objective, Probative Probable Cause Evidence*

The Supreme Court in *Hartman* found that actions for retaliatory prosecution provided an opportunity to impose an objective standard on an intent-based constitutional tort that is otherwise difficult to adjudicate. Because First Amendment retaliation actions center on the defendant's subjective intent,<sup>33</sup> these claims, including those for retaliatory prosecution, present real adjudicatory difficulties.<sup>34</sup> Defending against and adjudicating an action for First Amendment retaliation is problematic because retaliatory motive is "easy to allege and hard to disprove."<sup>35</sup> An arrestee can, with little difficulty, file a complaint alleging that his arrest was the result of unconstitutional retaliation. A defendant officer can do little to prove definitively that he effectuated the arrest for permissible reasons, and a successful defense of the action depends largely on whether the fact finder believes the officer's version of the arrest over the plaintiff's. The defendant investigators in

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27. *Id.* at 254 (quoting *United States v. Recognition Equip. Inc.*, 725 F. Supp. 587, 596 (D.D.C. 1989)).

28. *Hartman*, 547 U.S. at 254.

29. *Moore v. United States*, 213 F.3d 705 (D.C. Cir. 2000).

30. *Moore v. Hartman*, 388 F.3d 871 (D.C. Cir. 2004), *rev'd*, 547 U.S. 250.

31. *Hartman*, 547 U.S. at 255–56.

32. *Id.* at 256–57.

33. See *infra* note 71 and accompanying text.

34. *Bloch v. Ribar*, 156 F.3d 673, 682 (6th Cir. 1998) ("'[C]laims involving proof of a [defendant's] intent seldom lend themselves to summary disposition.'") (alteration in original) (quoting *Curtis v. Story*, No. 87-5988, 1988 WL 125361, at \*3 (6th Cir. Nov. 25, 1988)).

35. *Crawford-El v. Britton*, 523 U.S. 574, 585 (1998) (quoting *Crawford-El v. Britton*, 93 F.3d 813, 821 (D.C. Cir. 1996) (en banc)).

*Hartman* invoked these difficulties to support their request for the protection of a no-probable-cause rule.<sup>36</sup>

The action for retaliatory prosecution is different. Unlike many other actions alleging First Amendment retaliation,<sup>37</sup> actions for retaliatory prosecution are consistently characterized by a dispute over one central fact: the presence or absence of probable cause for pressing the underlying charge. The Court recognized that “the significance of probable cause or the lack of it looms large, being a potential feature of every case, with obvious evidentiary value.”<sup>38</sup> This probable cause evidence is objective and speaks directly to the issue of whether or not the prosecution of the underlying charge was the result of unconstitutional retaliation.<sup>39</sup>

The Supreme Court justified its adoption of the objective no-probable-cause rule in part by arguing that lower courts could implement a rule making special use of probable cause evidence in the retaliatory-prosecution context with relative ease. Valuable probable cause evidence is always available<sup>40</sup> and “[t]he issue [of probable cause] is . . . likely to be raised by some party at some point”<sup>41</sup> in the retaliatory-prosecution context. Where the parties to the litigation will already have access to the evidence, and are likely already planning on devoting time and resources to disputing that evidence, courts can implement the rule without increasing the burden on either the litigants or the courts.<sup>42</sup>

### 3. *The Result Depends on the “Causal Gap” that Makes Proving Lack of Probable Cause Necessary*

Actions for retaliatory prosecution are characterized by a causal gap that makes demonstrating the link between the defendant’s animus and the alleged retaliation unusually complicated, and makes the presence of evidence that can bridge this gap all but necessary to prove retaliation. In the

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36. See *Hartman*, 547 U.S. at 257 (“The [defendant] inspectors argue [that a] plaintiff can afflict a public officer with disruption and expense by alleging nothing more, in practical terms, than action with a retaliatory animus, a subjective condition too easy to claim and too hard to defend against.”).

37. In, for instance, an action for retaliatory termination of employment, there is no objective standard outlining the instances in which termination is appropriate. *Id.* at 258.

38. *Id.* at 265.

39. Proving the absence of probable cause for pressing the underlying claim does much to help the plaintiff prove that his exercise of First Amendment rights was the but-for cause of his prosecution. See *Gullick v. Ott*, 517 F. Supp. 2d 1063, 1070 (W.D. Wis. 2007) (highlighting the probative value of probable cause evidence in assessing whether adverse state action was the result of unconstitutional retaliation).

40. *Hartman*, 547 U.S. at 261 (“[In the prosecution context] there will always be a distinct body of highly valuable circumstantial evidence available and apt to prove or disprove retaliatory causation, namely evidence showing whether there was or was not probable cause to bring the criminal charge.”).

41. *Id.* at 265.

42. *Id.* (“Our sense is that the very significance of probable cause means that a requirement to plead and prove its absence will usually be cost free by any incremental reckoning.”).

normal action alleging unconstitutional retaliation, a plaintiff makes the straightforward claim that an individual government officer undertook some adverse action as a result of personal animus engendered by the plaintiff's exercise of First Amendment rights.<sup>43</sup> The plaintiff can usually prove the link between the actor's animus and the retaliatory action with little complication.<sup>44</sup>

In the action for retaliatory prosecution, however, the link between animus and retaliatory action is more complex.<sup>45</sup> Because a prosecutor enjoys absolute immunity from suit related to prosecutorial decisions,<sup>46</sup> the plaintiff in a retaliatory-prosecution suit must normally sue investigators, police officers, or other government officials involved in the broader prosecution.<sup>47</sup> Consequently, plaintiffs must not only demonstrate animus on the part of the defendant officer or investigator but also that the defendant successfully induced the presumptively disinterested prosecutor to press charges that he would not otherwise have pressed.<sup>48</sup> A disconnect then exists—termed the “causal gap”—between the alleged animus of the defendant(s) and the adverse action.<sup>49</sup>

This break in the chain of causation makes the already valuable evidence of a lack of probable cause uniquely necessary and provides the ultimate rationale for the Court's adoption of the no-probable-cause rule in *Hartman*. The Court unambiguously stated that “[i]t is, instead, the need to prove a chain of causation from animus to injury, with details specific to retaliatory-prosecution cases, that provides the strongest justification for the no-probable-cause requirement.”<sup>50</sup> The causal gap makes it practically necessary to show that no probable cause existed in order to rebut the strong presumption that the intervening prosecutor acted independently and without unconstitutional bias. As the court explained, “[s]ome sort of allegation, then, is needed both to bridge the gap between the nonprosecuting government agent's motive and the prosecutor's action, and to address the presumption of prosecutorial regularity.”<sup>51</sup> Absent a showing that no prob-

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43. *Id.*

44. *See id.* at 261. This is not to say, however, that persuading a fact finder that the desire to retaliate was the but-for cause of the adverse action is *easy*.

45. *Id.* at 259 (“[T]he need to demonstrate causation in the retaliatory-prosecution context presents an additional difficulty that can be understood by comparing the requisite causation in ordinary retaliation claims . . . with causation in [retaliatory-prosecution claims].”).

46. *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976).

47. *Hartman*, 547 U.S. at 261–62 (“[An] action for retaliatory prosecution will not be brought against the prosecutor, who is absolutely immune from liability for the decision to prosecute. Instead the defendant will be a nonprosecutor, an official, like an inspector . . .”) (citation omitted).

48. *Id.* at 262. The Ninth Circuit, relying on language from *Hartman*, has noted that a retaliatory-prosecution action is “really ‘for successful retaliatory *inducement* to prosecute.’” *Skoog v. County of Clackamas*, 469 F.3d 1221, 1234 (9th Cir. 2006) (quoting *Hartman*, 547 U.S. at 262).

49. *Hartman*, 547 U.S. at 264.

50. *Id.* at 259.

51. *Id.* at 263.

able cause existed for pressing the underlying charge, in the Court's opinion, the presence of an intervening, presumptively disinterested, prosecutor is enough to defeat the claim.<sup>52</sup> If, however, the plaintiff can bridge the causal gap by demonstrating the absence of probable cause, he will give "the claim of retaliation . . . some vitality"<sup>53</sup> and sufficiently justify the adjudication of his tort action.

*B. Hartman Does Not Control Because the "Causal Gap"  
Does Not Characterize the Arrest Action*

*Hartman* does not control in the retaliatory-arrest context because of the two necessary considerations upon which the *Hartman* holding depends;<sup>54</sup> only the centrality and availability of objective, probative probable cause evidence characterizes the action for retaliatory arrest.<sup>55</sup> The Supreme Court explicitly stated that absent the causal gap found in the action for retaliatory prosecution, the adoption of the no-probable-cause rule would have been inappropriate: "[the centrality and availability of objective probable cause evidence] alone does not mean, of course, that a . . . plaintiff should be required to plead and prove no probable cause."<sup>56</sup> In the normal action for retaliatory arrest there is no causal gap: the plaintiff alleges that the animus of one identified defendant police officer caused that officer to arrest him when he otherwise would not have done so.<sup>57</sup>

Evidence of a lack of probable cause is relevant, but insufficient to warrant application of a no-probable-cause rule. True, a demonstrable absence of probable cause in the arrest context strongly suggests the presence of an unconstitutional motive, and undoubtedly strengthens the plaintiff's claim. Conceding the point, a federal district court in Wisconsin recently observed that "the absence of probable cause is strong evidence that the officer's true

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52. See *id.* ("[T]his presumption that a prosecutor has legitimate grounds for the action he takes is one we do not lightly discard, given our position that judicial intrusion into executive discretion of such high order should be minimal.").

53. *Id.* at 265.

54. See *supra* Sections I.A.2–3.

55. *Gullick v. Ott*, 517 F. Supp. 2d 1063, 1072 (W.D. Wis. 2007) ("[I]f an officer had probable cause for making an arrest, that tends to undermine an allegation that the arrest was fabricated, just as the absence of probable cause is strong evidence that the officer's true motive for the arrest was an illegal one.").

56. *Hartman*, 547 U.S. at 261; see *Gullick*, 517 F. Supp. 2d at 1070 ("The Court [in *Hartman*] saw [the causal gap] as dispositive . . .").

57. *Gullick*, 517 F. Supp. 2d at 1071 ("[C]oncerns raised by . . . a 'more complex' chain of causation . . . are not implicated when no prosecutor is involved in the claim and when the named defendant is directly responsible for the plaintiff's alleged injuries, as in this case [for retaliatory arrest]."); *Baldauf v. Davidson* (*Baldauf II*), No. 1:04-cv-1571-JDT-TAB, 2007 WL 2156065, at \*2 (S.D. Ind. July 24, 2007) ("At first glance, no such complex causation problems are present when a person brings a retaliatory arrest claim that focuses entirely on an officer's bodily seizure of a plaintiff through the power of arrest."); cf. *Skoog v. County of Clackamas*, 469 F.3d 1221, 1234 (9th Cir. 2006) (holding that the seizure of certain personal effects in retaliation for the exercise of First Amendment rights did not involve "multi-layered causation").

motive for the arrest was an illegal one.”<sup>58</sup> But as the same court ultimately held, absent a causal gap that requires bridging, proving the absence of probable cause is not necessary, and, by *Hartman*’s reasoning, a rule mandating that plaintiffs prove its absence is unjustified.<sup>59</sup>

Some courts have focused on dicta in *Hartman* to suggest that its holding sweeps broadly, applying in actions in which no gap renders the probable cause evidence all but necessary, but courts should reject this argument. The Sixth Circuit has argued that “*Hartman* appears to acknowledge that its rule sweeps broadly.”<sup>60</sup> In *Hartman*, the Supreme Court did concede that not *all* actions for retaliatory prosecution present complicated causation issues, admitting that “the requisite causation is *usually* more complex than it is in other retaliation cases.”<sup>61</sup> Accordingly, the Court appeared to accept that its no-probable-cause rule would unfairly burden plaintiffs in some actions in which proving the absence of probable cause was not necessary to bridge the causal gap.<sup>62</sup> The Court appeared willing to accept that “its holding . . . would come at a cost”<sup>63</sup> and that in some exceptional retaliatory-prosecution actions where the intervening prosecutor was himself not disinterested—either because he had his own animus or was sufficiently influenced by the defendants—plaintiffs would be unnecessarily burdened.<sup>64</sup>

Courts should not read this language to apply *Hartman* broadly. The Court, however, clearly noted that these exceptional actions would be “rare and consequently poor guides in structuring [the] cause of action.”<sup>65</sup> To sug-

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58. *Gullick*, 517 F. Supp. 2d at 1072.

59. *Id.* at 1070–71 (refusing to require a plaintiff in an action for retaliatory arrest to plead and prove the absence of probable cause). The Sixth Circuit has missed *Hartman*’s reliance on the causal gap. *See Barnes v. Wright*, 449 F.3d 709, 719 (6th Cir. 2006) (“The [*Hartman*] Court offered two main rationales for its holding: the issue of probable cause will likely be relevant in any retaliatory-prosecution case and the requisite causation between the defendant’s retaliatory animus and the plaintiff’s injury is usually more complex than it is in other retaliation cases.” (citations omitted) (internal quotation marks omitted)). Unfortunately, this bifurcation of *Hartman* has been ratified by several other federal district courts. *Baldauf II*, 2007 WL 2156065 at \*3 (“In *Barnes*, the Sixth Circuit noted that the Supreme Court offered two reasons for embracing a no-probable-cause requirement . . . [T]his court finds the Sixth Circuit’s reasoning persuasive for several reasons.”); *Williams v. City of Carl Junction*, 480 F.3d 871, 876 (8th Cir. 2007) (“We agree with the Sixth Circuit that the Supreme Court’s holding in *Hartman* is broad enough to apply even where intervening actions by a prosecutor are not present, and we conclude that the *Hartman* rule applies in this [action for retaliatory citation].”). *But see Gullick*, 517 F. Supp. 2d at 1072 (“But *Barnes* is not persuasive because the court stated only that the *Hartman* rule ‘sweeps broadly’ without explaining why.”).

60. *Barnes*, 449 F.3d at 720; *see also Baldauf II*, 2007 WL 2156065 at \*3 (approving of the *Barnes* analysis); *Williams*, 480 F.3d at 876 (same).

61. *Hartman*, 547 U.S. at 261 (emphasis added).

62. *Baldauf II*, 2007 WL 2156065 at \*4.

63. *Id.*

64. *Hartman*, 547 U.S. at 264 (“A prosecutor’s disclosure of retaliatory thinking on his part, for example, would be of great significance in addressing the presumption and closing the gap. So would evidence that a prosecutor was nothing but a rubber stamp for his investigative staff or the police.”).

65. *Id.*

gest, then, that this language justifies the imposition of the no-probable-cause rule in a class of actions in which the *overwhelming majority* of plaintiffs would be burdened without the practical necessity engendered by the causal gap perverts this judicial compromise.<sup>66</sup>

## II. NO PERSUASIVE LEGAL ARGUMENT EXISTS FOR IMPOSING THE NO-PROBABLE-CAUSE RULE IN ARREST ACTIONS

This Part argues that the presence of probable cause is not determinative in retaliatory-arrest actions and that pre-*Hartman* courts applying the no-probable-cause rule did so without providing precedential support or a novel, compelling legal rationale for their holdings. Section II.A argues that the presence of probable cause in the retaliatory-arrest context does nothing more than provide one possible permissible justification for undertaking the challenged arrest. Section II.A then asserts that the application of an established constitutional principle—that an act taken in retaliation for the exercise of First Amendment rights is actionable even if the act would have been proper when taken for a different reason—demonstrates that the presence of probable cause does not determine, as a matter of law, the causation issue in a retaliatory-arrest action. Section II.B identifies the seminal no-probable-cause rule cases in the Eleventh and Second Circuits—the two federal courts of appeals that applied the rule pre-*Hartman*—and argues that courts should reject them for relying on impertinent case law and failing to articulate novel, compelling legal grounds on which to base their holdings.

### A. *The Presence of Probable Cause Does Not Prevent Plaintiffs from Proving the Causation Element*

The presence of probable cause does not determine the action for retaliatory arrest because it simply provides one possible justification for the challenged arrest, and under established Supreme Court precedent, the presence of an alternate, non-retaliatory justification for the challenged action does not, as a matter of law, defeat a retaliation claim. A First Amendment challenge to an arrest, unlike, for instance, a Fourth Amendment<sup>67</sup> challenge, does not rest on an allegation that the arrest was unsupported by probable

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66. Nearly any arrest can, with little effort, meet the “relatively low standard” that it be supported by probable cause. Sadiq Reza, *Privacy and the Criminal Arrestee or Suspect: In Search of a Right, in Need of a Rule*, 64 MD. L. REV. 755, 796–97 (2005) (noting that the probable cause standard is easy to satisfy while arguing that a requirement that the identity of an arrestee be protected until a judge has determined that probable cause exists would protect important constitutional rights).

67. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . .”).

cause.<sup>68</sup> The First Amendment guarantees freedom from interference with, *inter alia*, speech, assembly, and religious rights.<sup>69</sup>

In the arrest context, then, the First Amendment does not proscribe arrests unsupported by probable cause, but prevents the government from stifling rights in a way that it could not through legislation or regulation.<sup>70</sup> The First Amendment thus concerns itself with impermissible intent in an effort to prevent the government from achieving a kind of constitutional end around that would allow it to circumvent the First Amendment's restrictions.<sup>71</sup> So if the arresting officer's desire to retaliate was the actual cause of the arrest, the arrest will be actionable under the First Amendment.<sup>72</sup> The presence of probable cause does not conclusively determine actual intent—it provides but one possible explanation for the occurrence of the arrest. Consequently, a plaintiff in a retaliation challenge to an arrest can logically maintain that his arrest was the actual result of impermissible retaliation even where the arrest was supported by judicially validated probable cause.

Under established Supreme Court precedent, in an action for retaliatory arrest, the existence of one possible permissible justification for an allegedly retaliatory arrest does not, as a matter of law, render it impossible to prove that the arrest was, in fact, unconstitutional. In the First Amendment retaliation context, the Supreme Court has held that state action taken for a constitutionally impermissible reason is actionable even if it would have been proper when taken for a different, fully legal reason:

[We have] made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which

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68. The Fourth Amendment protects individuals from unreasonable searches and seizures, including arrests, which are merely bodily seizures. *Payton v. New York*, 445 U.S. 573, 585 (1980) ("The simple language of the [Fourth] Amendment applies equally to seizures of persons and to seizures of property."). Where probable cause to arrest exists, an officer is constitutionally empowered to make an arrest that is not otherwise illegal. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) ("There is no dispute that [defendant] had probable cause to believe that [plaintiff] had committed a crime . . . . [Defendant] was accordingly authorized (not required, but authorized) to make a custodial arrest without balancing costs and benefits or determining whether or not [plaintiff's] arrest was in some sense necessary."). A Fourth Amendment challenge to an arrest asserts that the arrest was unsupported by the constitutionally required probable cause, and is unconcerned with retaliatory motive. *E.g.*, *Joseph v. Rowlen*, 402 F.2d 367, 370 (7th Cir. 1968); *see also Whren v. United States*, 517 U.S. 806, 813 (1996) ("We think [our] cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved. . . . Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."). A Fourth Amendment challenge thus cannot succeed where the arresting officer had probable cause for effectuating the arrest. *E.g.*, *Singer v. Fulton County Sheriff*, 63 F.3d 110, 118–19 (2d Cir. 1995) ("There can be no federal civil rights claim for false arrest where the arresting officer had probable cause.").

69. U.S. CONST. amend. I.

70. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("[First Amendment retaliation] allow[s] the government to 'produce a result which [it] could not command directly.'" (third alteration in original) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

71. *E.g. Crawford-El v. Britton*, 523 U.S. 574, 612 (1998) (Scalia, J., dissenting) (characterizing retaliation actions as "intent-based" constitutional torts).

72. *See cases cited supra* note 7.

the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.<sup>73</sup>

The federal courts of appeals have fully embraced this holding in their First Amendment retaliation jurisprudence.<sup>74</sup> The Sixth Circuit expressed this general acceptance when it held that “[t]he law is well established that ‘[a]n act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper.’”<sup>75</sup>

Importantly, the Supreme Court has not retreated from this holding: its imposition of the no-probable-cause rule notwithstanding, the Supreme Court reaffirmed this holding in *Hartman*.<sup>76</sup> In the arrest context, then, the fact that a defendant officer had valid grounds for arresting a plaintiff, independent of any impermissible speech-related animus, does not mean that the officer did not arrest for an unconstitutional retaliatory reason.<sup>77</sup> Consequently, the existence of probable cause for effectuating the underlying arrest should not, as a matter of law, negate the causation element of the claim.<sup>78</sup> Crucially, the presence of probable cause does not mean that retaliatory motive was not the “but-for” cause of the arrest. Though the presence or absence of probable cause speaks

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73. *Perry*, 408 U.S. at 597.

74. *Greene v. Barber*, 310 F.3d 889, 895 (6th Cir. 2002); *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990); *Losch v. Borough of Parkesburg*, 736 F.2d 903, 907–08 (3d Cir. 1984); *Buise v. Hudkins*, 584 F.2d 223, 230 (7th Cir. 1978) (citing and applying *Perry* in a First Amendment retaliation action).

75. *Greene*, 310 F.3d at 895 (second alteration in original) (quoting *Bloch v. Ribar*, 156 F.3d 673, 681–82 (6th Cir. 1998)).

76. *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (“Some official actions adverse to such a speaker might well be unexceptionable if taken on other grounds, but when nonretaliatory grounds are in fact insufficient to provoke the adverse consequences, we have held that retaliation is subject to recovery as the but-for cause of official action . . .”).

77. *Greene*, 310 F.3d at 895 (“[H]owever, the existence of probable cause is not determinative of the constitutional question if, as alleged here, the plaintiff was arrested in retaliation for his having engaged in constitutionally protected speech.”); *Gullick v. Ott*, 517 F. Supp. 2d 1063, 1069 (W.D. Wis. 2007). Because of the unique and awesome powers possessed by police officers, this rule might have even more valuable in the arrest context than in other retaliation contexts. *Id.* (“[T]he consequences of [rejecting the doctrine] are troubling because it would permit unethical officers to target their enemies or critics with a litany of citations for petty violations that would be ignored if committed by anyone else.”).

78. See *supra* note 16.



directly to the defendant officer's motivation in arresting the plaintiff,<sup>79</sup> it should not ultimately determine the issue of causation.<sup>80</sup>

B. Cases Applying the No-Probable-Cause Rule  
Pre-Hartman Are Unpersuasive

The federal courts of appeals cases applying the no-probable-cause rule before the Supreme Court's decision in *Hartman* were wrongly decided. Courts should reject the Eleventh Circuit's adoption of the no-probable-cause rule because it relied on a decision that did not address a claim for retaliation, and consequently did not address the issue of impermissible intent that is central to all retaliation actions. In *Redd v. City of Enterprise*, the Eleventh Circuit granted summary judgment in favor of defendant police officers based on qualified immunity in an action alleging First Amendment retaliatory arrest.<sup>81</sup> It held that the officers, in arresting protestors with probable cause to believe they were in violation of a local disorderly conduct statute, did not violate plaintiffs' clearly established First Amendment rights.<sup>82</sup>

For the proposition that the officers did not violate any established speech rights, the *Redd* court relied on *Zurcher v. Stanford Daily*,<sup>83</sup> but *Zurcher* did not involve the issue central to retaliation actions: retaliatory animus. In *Zurcher*, police officers executed a warrant at the offices of the Stanford University newspaper seeking to obtain photographs and other documentary evidence that the officers believed would help them identify

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79. Though there is no indication that police officers always or even often arrest individuals who have given them probable cause to do so, one can assume that probable cause tends to support an officer's assertion that he arrested for constitutionally benign reasons. The *Gullick* court agreed with this proposition:

This is not to say that the existence or absence of probable cause is an unimportant fact to consider in an assessment [of] whether an arrest . . . was conducted for retaliatory reasons. . . . [I]f an officer had probable cause for making an arrest, that tends to undermine an allegation that the arrest was fabricated.

*Gullick*, 517 F. Supp. 2d at 1072.

80. *Id.* ("[The presence of probable cause] does not change the ultimate question, which is whether the defendant would have taken the same act in the absence of the plaintiff's protected conduct.").

81. 140 F.3d 1378, 1384 (11th Cir. 1998). Importantly, *Redd* is not an isolated incidence of judicial folly, but is the seminal Eleventh Circuit no-probable-cause rule case and has been cited by several courts for the proposition that the existence of probable cause precludes an action for retaliatory arrest. *Dahl v. Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002); *Ybarra v. City of Miami*, No. 02-20972-CIV, 2003 WL 25564426, at \*19 (S.D. Fla. Aug. 12, 2003).

82. *Redd*, 140 F.3d at 1383-84. Granting "qualified immunity" is perhaps error on the court's part. Since it held that no constitutional right was violated, the court did not actually grant qualified immunity, a device used to protect state actors who through reasonable mistake violate protected rights. This mistake is not uncommon, and the Supreme Court has been careful to remind lower courts not to confuse the pleading requirements in a retaliation action with the separate (though closely related) issue of qualified immunity. See *Crawford-El v. Britton*, 523 U.S. 574, 588-89 (1998).

83. 436 U.S. 547 (1978).

individuals who they suspected had violated laws during a protest.<sup>84</sup> Several students at the newspaper filed suit under § 1983<sup>85</sup> alleging violation of their First and Fourth Amendment rights.<sup>86</sup> The students challenged the execution of the warrant, arguing that only a subpoena *duces tecum*<sup>87</sup> could properly ensure the protection of vital First Amendment rights when the government wished to execute a search warrant.<sup>88</sup> Crucially, the *Zurcher* plaintiffs made no allegation that the defendant officers sought or executed the warrant in an effort to punish the newspaper or its employees for the exercise of protected rights.

Without such an allegation of unconstitutional motive, one simply cannot read *Zurcher* to support the imposition of the no-probable-cause rule in retaliatory-arrest actions. Improper motivation is the defining characteristic of an action for retaliatory arrest and one cannot ignore this in adjudicating the dispute.<sup>89</sup> In this setting, holding that a properly motivated search supported by probable cause does not violate First Amendment rights is both uncontroversial and wholly silent on the crucial issues in a retaliatory-arrest action. Readers of *Redd* and its progeny should demand more before crediting the Eleventh Circuit's application of the no-probable-cause rule.

Courts should also reject the Second Circuit's pre-*Hartman* rule holding that the existence of probable cause precludes an action for retaliatory arrest. The seminal case, *Mozzochi v. Borden*,<sup>90</sup> has two significant weaknesses. First, the *Mozzochi* court summarily refused to inquire into the defendant officer's motivation for arresting the plaintiff in an action for retaliatory arrest. *Mozzochi* held that "because there was probable cause in this case to believe that [plaintiff] violated the harassment statute, we will not examine the defendants' motives in reporting [plaintiff's] actions to the police for prosecution."<sup>91</sup> Courts should question *Mozzochi*'s refusal, without providing any justification, to consider the defendant's intent in an *intent-based* constitutional tort.<sup>92</sup>

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84. *Zurcher*, 436 U.S. at 550–51.

85. 42 U.S.C. § 1983 (2000).

86. *Zurcher*, 436 U.S. at 552.

87. See generally 98 C.J.S. *Witnesses* § 21 (2007). A subpoena *duces tecum* is a subpoena "used to procure the production of books and records." *Id.*

88. *Zurcher*, 436 U.S. at 560.

89. See *supra* note 71 and accompanying text; see also *Crawford-El v. Britton*, 523 U.S. 574, 588 (1998) ("It is equally clear that an essential element of some constitutional claims is a charge that the defendant's conduct was improperly motivated."); *Gullick v. Ott*, 517 F. Supp. 2d 1063, 1069 (W.D. Wis. 2007) ("[T]he [Seventh Circuit] court of appeals has made it clear that motive matters.").

90. 959 F.2d 1174 (2d Cir. 1992). In two separate opinions the Second Circuit relied on *Mozzochi* in imposing some variation of the no-probable-cause rule in adjudicating retaliatory-arrest claims. *Curley v. Vill. of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001); *Singer v. Fulton County Sheriff*, 63 F.3d 110, 120 (2d Cir. 1995).

91. *Mozzochi*, 959 F.2d at 1179–80.

92. See *supra* note 71 and accompanying text (discussing why motive matters).

Second, a subsequent Second Circuit decision seriously undermined *Mozzochi*'s central holding. In *Blue v. Koren*, the Second Circuit called *Mozzochi* into doubt for its suggestion that plaintiffs cannot maintain retaliatory-arrest actions where the underlying arrest is supported by probable cause: "*Mozzochi* [is] troubling in that [it] appear[s] to negate the existence of a retaliation claim involving arrests. If probable cause provides qualified immunity from a retaliation claim, then such a claim can be asserted only in cases in which a false arrest claim can also be made."<sup>93</sup> Courts adjudicating retaliatory-arrest claims should not rely on this weakened opinion.

### III. PROPONENTS HAVE NOT ARTICULATED A PERSUASIVE POLICY RATIONALE FOR APPLYING THE RULE IN ARREST ACTIONS

Neither existing legal doctrine<sup>94</sup> nor controlling precedent<sup>95</sup> recommend imposing the no-probable-cause rule in actions for retaliatory arrest, and no court or scholar has yet articulated a sufficiently persuasive policy argument in favor of applying the rule to retaliatory-arrest claims.<sup>96</sup> This Part argues that, though intent-based constitutional torts present adjudicatory difficulties,<sup>97</sup> proponents of the no-probable-cause rule currently overstate the worries underlying their principle arguments for the imposition of the rule. Section III.A argues that the litigation statistics demonstrate that the volume of retaliatory-arrest actions is relatively unremarkable, and should mute concerns over a need to reduce the number of such actions by making the claim more difficult to plead and prove. Section III.A further argues that the current volume of retaliatory-arrest litigation will not impair the quality of policing because officers can work free from worries about being haled into court knowing that judges can enter summary judgment based on qualified immunity to protect well-meaning defendants from the burdens of protracted litigation. Section III.B argues that courts and government agents need not fear a surge in retaliatory-arrest actions once courts fully reject the no-probable-cause rule in the arrest context, emphasizing the role that qualified immunity can play in protecting officers from spurious allegations and freeing dockets of frivolous litigation.

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93. *Blue v. Koren*, 72 F.3d 1075, 1083 n.5 (2d Cir. 1995). The court went on to suggest an alternate, less troubling, justification for the troubling holding: a similarly troubling case "stressed the lack of particularized evidence of a retaliatory motive in finding that qualified immunity existed. There was a similar lack of evidence in *Mozzochi*, where the arrest was in response to a threatening communication." *Id.*

94. See *supra* Part II.

95. See *supra* Part I.

96. Some jurists assert that intent-based torts should not be actionable under the Civil Rights Act. See *supra* notes 10–11 and accompanying text. This argument, though perhaps correct as a historical matter or as a matter of statutory interpretation, raises issues outside the scope of this Note.

97. See *supra* note 34 and accompanying text.

*A. Courts Can Manage Arrest Actions Without Making the  
Claim More Difficult to Plead and Prove*

Retaliatory-arrest actions are not so prevalent or difficult to adjudicate that they unduly burden the nation's courts and inhibit defendant officers' ability to effectively police. Proponents of the no-probable-cause rule have urged courts to make intent-based constitutional torts more difficult to plead and prove because the actions are clogging courts' dockets and unduly burdening defendant government agents, impairing their ability to effectively police.<sup>98</sup>

The litigation statistics, however, do not reveal a volume of retaliatory-arrest actions worthy of concern. In the last quarter-century, litigants have squarely presented only twenty-nine actions for retaliatory arrest to federal courts of appeals.<sup>99</sup> The Supreme Court, arguing in *Hartman* that the number of retaliatory-prosecution actions was wholly reasonable and not unduly burdening government defendants or adjudicating courts, used an identical metric and identified a similar incidence of such actions.<sup>100</sup> The Court found that the number of retaliatory-prosecution claims was insufficient cause for concern and argued that there is not "much leverage in the fear that without a filter to screen out claims [defendant] federal prosecutors and federal courts will be unduly put upon by the volume of litigation."<sup>101</sup>

Judges can control the courts' dockets and protect government agents from those retaliatory-arrest claims that are filed by utilizing several procedural tools, including summary judgment based on qualified immunity. As the Supreme Court argued in *Crawford-El*, trial courts adjudicating intent-based constitutional torts can lessen the litigation burden on defendants by employing several procedural tools: courts can require plaintiffs to provide sufficiently particularized pleadings, aggressively manage discovery, and use summary judgment "as the ultimate screen to weed out truly insubstantial lawsuits."<sup>102</sup>

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98. E.g., *Baldauf v. Davidson* (*Baldauf II*), No. 1:04-cv-1571-JDT-TAB, 2007 WL 2156065, at \*4 (S.D. Ind. July 24, 2007); see *Hartman v. Moore*, 547 U.S. 250, 259 (2006) (rejecting plaintiffs' policy arguments).

99. This number was ascertained by performing the following search on Westlaw's "CTA" database: "retaliat!" /s "first amendment" /s "arrest." The search covered the twenty-five years from 1982 to 2007. As of October 10, 2007, a total of sixty-two cases appear, but in only twenty-nine were the merits of a claim for retaliatory arrest actually at issue on appeal.

100. *Hartman*, 547 U.S. at 258–59 ("Over the past 25 years fewer than two dozen damages actions for retaliatory prosecution ... have come squarely before the Federal Courts of Appeals ...").

101. *Id.* at 258.

102. *Crawford-El v. Britton*, 523 U.S. 574, 600 (1998); see *id.* at 597–602 (discussing why courts are capable of managing the difficulties associated with intent-based constitutional torts). Two federal district courts recently proved capable of handling intent-based constitutional torts in the manner the Supreme Court suggested. See *Lyman v. City of Albany*, No. 1:06-CV-1109 (LEK/DRH), 2008 WL 563378, at \*2 (N.D.N.Y. March 3, 2008) ("Plaintiff's claim of retaliation does not rise above the purely speculative level required to survive Defendants' Motion to dismiss."); *Eno Farms Coop. Ass'n v. Corp. for Indep. Living*, No. 3:06cv1983(AHN), 2007 WL 3308016, at \*10 (D. Conn. Nov. 5, 2007) ("[B]ecause the causal link supporting [the] claim is not

Most importantly, courts can be aggressive in entering summary judgment based on qualified immunity to protect well-meaning defendant officers from harassing litigation and help courts to avoid the prospect of resource-sapping trials. Qualified immunity protects a defendant government agent from liability "if he or she could have reasonably believed his or her conduct to be lawful 'in light of clearly established law and the information [that the defendant] possessed.'"<sup>103</sup> Qualified immunity is so defendant-friendly that the Eighth Circuit has observed that "[t]he qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law."<sup>104</sup> Consequently, well-meaning officers who do not "knowingly violate the law" can effectively execute their duties without fearing that they are one arrest away from facing debilitating litigation. Perhaps most importantly for those who worry that a claim for retaliatory arrest is a validated ticket to trial, courts decide the issue of qualified immunity pretrial as a matter of law "because '[t]he entitlement is an *immunity from suit* rather than a mere defense to liability.'"<sup>105</sup>

### B. Courts Should Not Fear a Surge in Retaliatory-Arrest Actions

In light of the central characteristics of the First Amendment retaliation action and the protections offered by qualified immunity, proponents of the no-probable-cause rule should not worry that, once the rule is fully and publicly rejected, arrestees will refashion non-First Amendment challenges as First Amendment challenges, causing a surge in retaliatory-arrest actions. A federal district court in Indiana, in imposing the no-probable-cause rule, articulated the fear that enterprising plaintiffs would transform constitu-

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self-evident, [and] the plaintiffs have an obligation [which they have not fulfilled] to amplify the claim with factual allegations rendering it plausible . . . the first amended complaint fails to state a claim of First Amendment retaliation.").

103. *Smithson v. Aldrich*, 235 F.3d 1058, 1061 (8th Cir. 2000) (alteration in original) (quoting *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)). See generally *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."). It is important to note that qualified immunity analysis presupposes that a constitutional violation has occurred. See *Dahl v. Holley*, 312 F.3d 1228, 1233 (11th Cir. 2002) ("In considering whether the officers are entitled to qualified immunity on [plaintiff's] § 1983 claims, we must first determine whether the facts . . . establish a constitutional violation."); *Bloch v. Ribar*, 156 F.3d 673, 678 (6th Cir. 1998) ("Before we can consider whether [defendant] is entitled to qualified immunity . . . we must first examine whether the [plaintiffs] have properly alleged a cause of action.").

104. *Smithson*, 235 F.3d at 1061 (quoting *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (per curiam)) (internal quotation marks omitted).

105. *Hunter*, 502 U.S. at 227 (alteration in original) (quoting *Mitchell v. Forsyth*, 472, U.S. 511, 526 (1985)); see also *id.* ("[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation."); *Harlow*, 457 U.S. at 818 ("On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. . . . Until this threshold immunity question is resolved, discovery should not be allowed." (footnote omitted)).

tional challenges to arrests that are defeated by probable cause<sup>106</sup> into First Amendment challenges in the face of more plaintiff-friendly claim elements: “[failing to adopt the rule] would allow numerous plaintiffs to bring Fourth Amendment claims that would otherwise be dismissed by relabeling them as First Amendment retaliation claims.”<sup>107</sup>

This argument overlooks the fact that not all arrests that plaintiffs might challenge implicate First Amendment concerns.<sup>108</sup> As part of a claim for retaliatory arrest, a plaintiff must allege the exercise of a protected right and the centrality of that right in the decision to arrest.<sup>109</sup> The Supreme Court has made clear that “[w]hen intent is an element of a constitutional violation . . . the primary focus is not on any possible animus directed at the plaintiff; rather, it is more specific, such as . . . to deter public comment on a specific issue of public importance.”<sup>110</sup> Although plaintiffs are free in practice to plead facts not in existence, a plaintiff’s ability to fabricate does not warrant changing the elements of an established constitutional tort.<sup>111</sup>

Because the extent to which the plaintiff’s conduct is clearly protected by the First Amendment is central to determining the reasonableness of the defendant’s conduct, defendant officers are adequately protected from the creative pleading of plaintiffs seeking to apply the retaliatory-arrest claim elements to arrests that do not implicate First Amendment concerns. For a government agent to be held liable for violating an individual’s constitutional rights, the Supreme Court has held that “[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.”<sup>112</sup>

Plaintiffs disingenuously pleading that their arrests implicated First Amendment concerns would have trouble meeting this standard because they would have to creatively redefine unprotected conduct to bring it within

106. A Fourth Amendment challenge to an arrest is one such action that is defeated by the presence of probable cause. *See supra* note 68.

107. *Baldauf v. Davidson*, No. 1:04-cv-1571-JDT-TAB, 2007 WL 2156065, at \*4 (S.D. Ind. July 24, 2007); *see also Crawford-El*, 523 U.S. at 604–05 (Rehnquist, C.J., dissenting). Rehnquist argued:

Such a rule would also allow plaintiffs to strip defendants of [qualified immunity] protections by a simple act of pleading—any minimally competent attorney (or *pro se* litigant) can convert any adverse decision into a motive-based tort, and thereby subject government officials to some measure of intrusion into their subjective worlds.

*Id.* at 605.

108. Some arrests, for instance, implicate only the individual’s interest in being free from unreasonable search and seizure. *See supra* note 68.

109. *See supra* note 6 and accompanying text.

110. *Crawford-El*, 523 U.S. at 592; *see supra* note 6 and accompanying text.

111. Ideally, disciplinary consequences, such as sanctions available under Rule 11 of the Federal Rules of Civil Procedure would sufficiently deter the filing of spurious claims. FED. R. CIV. P. 11; *see also* CTC Imps. & Exps. v. Nigerian Petroleum Corp., 739 F. Supp. 966, 969 (E.D. Pa. 1990) (“The purpose of Rule 11 . . . is to discourage pleadings which are frivolous, legally unreasonable, or without factual foundation.”).

112. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *see also* *Dickerson v. McClellan*, 101 F.3d 1151, 1158 (6th Cir. 1996).

the protection of the First Amendment. Consequently, even if a court were to ultimately find the plaintiff's creatively defined right was protected by the First Amendment, the officer would be entitled to summary judgment based on qualified immunity because he could not reasonably have known such conduct was constitutionally protected. The more spurious the retaliatory-arrest claim, the more likely the defendant officer will be able to avail himself of the protections offered by qualified immunity by arguing that the creatively pleaded First Amendment right is not "clearly established."

### CONCLUSION

The First Amendment protects rights at the very heart of the American democratic experiment<sup>113</sup> and these rights are deserving of the most zealous protection. Neither *Hartman*, nor the judicially defined elements of the claim, nor the pre-*Hartman* decisions of the Second and Eleventh Circuits, should compel courts to find the presence of probable cause preclusive in an action for retaliatory arrest. A strong desire to screen spurious claims from the courts and to protect government agents from vexatious litigation also does not favor imposition of the no-probable-cause rule. Indeed, courts rejecting the no-probable-cause rule are not only capable of handling First Amendment retaliation claims—individually and in the aggregate—but are advancing important constitutional values.

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113. See *City of Houston v. Hill*, 482 U.S. 451, 462–63 (1987) ("The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."); *McCurdy v. Montgomery County*, 240 F.3d 512, 520 (6th Cir. 2001) ("Since the day the ink dried on the Bill of Rights, [t]he right of an American citizen to criticize public officials and policies . . . is the central meaning of the First Amendment." (alterations in original) (quoting *Glasson v. City of Louisville*, 518 F.2d 899, 904) (1975) (internal quotation marks omitted)); cf. Franklin D. Roosevelt, Annual Message to Congress (January 6, 1941), in *THE YALE BOOK OF QUOTATIONS* 646, 646 (Fred R. Shapiro ed., 2006) ("In the future days, which we seek to make secure, we look forward to a world founded upon four essential human freedoms. The first is freedom of speech and expression—everywhere in the world.").